Supreme Court, U.S.
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No. _____

In The

Supreme Court of the United States

INDEPENDENT PETROLEUM ASSOCIATION OF AMERICA,

Petitioner,

v.

UNITED STATES FOREST SERVICE, an agency of the United States Department of Agriculture,

and

MONTANA WILDERNESS ASSOCIATION, PROFESSIONAL WILDERNESS OUTFITTERS, BACK COUNTRY HORSEMEN OF MONTANA, THE WILDERNESS SOCIETY, INC., SIERRA CLUB, MONTANA AUDUBON, NATIONAL WILDLIFE FEDERATION, KAA MO TAAN, and GEORGE ENGLER,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether an organization, whose members have been denied the opportunity to bid for oil and gas leases on federal lands and have participated in the administrative process that led to a "no-leasing" decision, suffers an Article III "injury in fact" and, therefore, has standing to challenge the legality of the no-leasing decision?

2. Whether the prudential standing "zone of interests" test bars an organization from enforcing the procedural requirements of NEPA when that organization's interest in so doing is solely economic?

3. Whether, under NEPA, the psychological effects of an oil and gas leasing decision may be considered and serve as the basis for a no-leasing decision when the federal agency determines that leasing will not affect the human environment?

LIST OF PARTIES AND CORPORATE DISCLOSURE STATEMENT

In addition to Petitioners and Respondents listed in the above caption, the Rocky Mountain Oil and Gas Association ("RMOGA") participated in the proceedings before the District Court as Plaintiffs.

Petitioner, Independent Petroleum Association of America ("IPAA"), is a not-for-profit organization representing the nation's small and independent oil and gas producers. IPAA does not have a parent company nor does IPAA have corporate stock.

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Review is sought of the opinion of the United States Court of Appeals for the Ninth Circuit, *Rocky Mountain Oil and Gas Association and Independent Petroleum Association of America v. United States Forest Service, et al.*, 2001 WL 470022 (unpublished), affirming a grant of summary judgment for the United States by the U.S. District Court for the District of Montana. That Ninth Circuit Opinion appears at pages 2-4 of the Appendix ("App.") The District Court opinion, *Rocky Mountain Oil and Gas Association and Independent Petroleum Association of America v. United States Forest Service, et al.* (CV-98-22-H) (unpublished), appears at App. 6-15.

JURISDICTION

This Court has jurisdiction to hear this case under Article III of the United States Constitution and has the power to grant *certiorari* under 28 U.S.C. § 1254. The judgment for which review is sought was entered on May 3, 2001, by the United States Court of Appeals for the Ninth Circuit.

CONSTITUTIONAL PROVISION INVOLVED

This Petition for *writ of certiorari* concerns Article III, Section 2, of the United States Constitution. App. 16.

STATUTES INVOLVED

This Petition concerns portions of the Administrative Procedures Act, 5 U.S.C. §§ 551, *et seq.*, the National Forest Management Act, 16 U.S.C. §§ 1600, *et seq.*, App. 19-21, the National Environmental Policy Act, 42 U.S.C. §§ 4321, *et seq.*, App. 17-19; and the Mineral Leasing Act of 1920, 30 U.S.C. §§ 181, *et seq.*

STATEMENT OF THE CASE

Summary

This case concerns the ability of oil and gas operators, some of whom live, work, and recreate in Montana, who seek to develop energy resources on federal lands there and who participated in the process by which the U.S. Forest Service choose not to permit oil and gas leasing of those lands, to challenge alleged violations of federal mineral leasing and environmental laws. Notwithstanding their interest, their involvement, and their inability to bid for oil and gas leases, they have been held to lack Article III and prudential standing to challenge these violations, including a decision by the Forest Service that, notwithstanding the absence of any adverse environmental consequences, the lands would not be leased due to the non-specific, emotional concerns of those far distant from Montana. The irony of this view of standing is that those nearest to and most directly affected by the Forest Service's decision are unable to challenge what they believe to be the illegal elevation of the "emotion[al]" over the "scientific" in response to the demands of those whose closest contact with the subject federal lands will always be from afar.

The Overthrust Belt, a geologic formation that lies east of the Rocky Mountains as they stretch from New Mexico to Montana, is the most likely source for new onshore oil and gas discoveries on federal lands. Within the Overthrust Belt, one of the most likely sources for new energy production is an area in north-central Montana, specifically, the Lewis and Clark National Forest ("Lewis and Clark"). The portion of the Overthrust Belt within the Lewis and Clark contains in excess of 20

trillion cubic feet of recoverable natural gas, the production of which could generate as much as 40 million dollars annually.[1]

Consistent with its obligations, under a host of federal laws, to ensure the development of such an important energy resource while protecting federal lands and the environment, the Forest Service initiated the process necessary to determine whether to issue oil and gas leases in the Lewis and Clark. Throughout that process, the Forest Service recognized both the presence of rich oil and gas resources and the ability to explore for and develop those resources without harm to the environment. Inexplicably, the Forest Service then determined that, notwithstanding the absence of harm to the environment from oil and gas leasing, it would prohibit leasing because of the "emotions," "feel[ings]," and "perceptions" of those opposed to leasing. When oil and gas operators sought to challenge alleged violations of various mineral leasing and environmental statutes, the U.S. District Court in Montana and the U.S. Court of Appeals for the Ninth Circuit ruled that they lacked Article III standing and failed to meet the "zone of interests" test of NEPA. These courts also held that psychological harms, unconnected to any on-the-ground environmental impact because there would be no such impact, could serve as the basis for the Forest Service decision.

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[1] "Domestic Natural Gas Supply and Demand: The Contribution of Public Lands and the OCS" (www.house.gov/resources/107cong/energy/2001mar15/fischer.htm); "Lewis and Clark National Forest Oil and Gas Leasing: Final Environmental Impact Statement," September 1997, Appendix B at 42(d).

Statutory Background

This case involves primarily three federal statutes. First, the National Forest Management Act of 1976 ("NFMA"), 16 U.S.C. §§ 1600, *et seq.*, requires the Forest Service to develop, maintain, and, "as appropriate," revise land management plans ("forest plans") for each of the national forests. 16 U.S.C. § 1604(a). All use of the resources within a specific national forest is controlled by its forest plan and must be consistent with it. 16 U.S.C. § 1604(i). The forest plan must be developed according to a "systematic interdisciplinary approach" based on "physical, biological, economic, and other sciences." 16 U.S.C. § 1604(b). NFMA also requires public participation in the promulgation, amendment, and revision of a forest plan. 16 U.S.C. § 1604(d). Specifically, the public must be given adequate notice and an opportunity to comment upon "the formulation of standards, criteria, and guidelines" applicable to forest plan revisions. 16 U.S.C. § 1612(a).

Second, the National Environmental Policy Act of 1969 (NEPA), 42 U.S.C. §§ 4321, *et seq.*, requires federal agencies to prepare an environmental impact statement (EIS) for all proposed federal agency actions "significantly affecting the quality of the human environment,"[2] in order to encourage "productive and enjoyable harmony between man and his environment," to fulfill "economic and other requirements of present and future generations of Americans," 42 U.S.C. § 4331(a), and to

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[2] The term "human environment" is "interpreted comprehensively" to include "economic or social and natural or physical environmental effects" when such effects are interrelated. 40 C.F.R. §-1508.14.

attain "the widest range of beneficial uses of the environment without degradation, risk to health or safety, or other undesirable and unintended consequences." 42 U.S.C. § 4331(b)(3). The federal agency must first issue a Draft EIS for public comment and explain, "to the fullest extent possible," "all major points of view on the environmental impacts of the alternatives. . . . " 40 C.F.R. § 1502.9(a). After receiving public comment, the agency must issue a Final EIS that discusses any "responsible opposing view which was not adequately discussed in the [Draft EIS]." 40 C.F.R. § 1502.2(b). The agency must prepare a supplemental impact statement whenever there are "significant new circumstances or information . . . bearing on the proposed action or its impacts" that have not been adequately addressed in either the Draft or Final EIS. 40 C.F.R. § 1502.2(c)(1)(ii). Finally, the agency must issue a record of decision (ROD) discussing all "relevant factors including economic and technical considerations" that went into the agency's final decision. 40 C.F.R. § 1505.2(b).

Third, the Mineral Leasing Act of 1920 (MLA), 30 U.S.C. §§ 181, *et seq.*, sets forth the manner in which federal lands are to be made available for oil and gas leasing. Until 1987, the Bureau of Land Management (BLM) had sole authority to issue such leases on national forest lands, after considering, but not necessarily conceding to, Forest Service recommendations regarding oil and gas leasing. In 1987, Congress amended the MLA by barring the BLM from issuing oil and gas leases in national forests without the express prior approval of the Secretary of Agriculture. 30 U.S.C. § 226(h). In March 1990, the Forest Service adopted regulations implementing the 1987 MLA amendments. 36 C.F.R. § 228.102. The regulations require the Forest Service to review all

national forest lands not already analyzed for oil and gas leasing and, then, (i) to designate lands that are "administratively available" for oil and gas leasing, 36 C.F.R. § 228.102(d), and (ii) to designate which administratively available lands may be leased. 36 C.F.R. § 228.102(e). Thereupon, the BLM is authorized to offer such lands for oil and gas leasing. *Id.*

The Forest Service Decision At Issue

In 1986, pursuant to NFMA, the Forest Service completed the Forest Land and Resource Management Plan ("Forest Plan") for the Lewis and Clark. In its Forest Plan, the Forest Service announced its intentions to permit the exploration for and development of energy resources within the Lewis and Clark:

> [A]pproximately 1.4 million acres of National Forest land on the Lewis and Clark National Forest, including potentially oil and gas-rich land in the Rocky Mountain Division, are available for mineral entry and leasing under the Forest Plan.

Final EIS, at I-8.

In July 1996, the Forest Service published a Draft EIS regarding the Lewis and Clark to comply with the 1987 MLA amendments. "Draft Environmental Impact Statement July 1996." The Draft EIS listed a number of alternative oil and gas options, including Alternative 7, the preferred alternative, which limited leasing activities to two mile-long strips within the Rocky Mountain Division, one bounded by existing roads, the other, by the boundary of the Lewis and Clark. Draft EIS Summary, at 4. The first area could be leased only under strictly "controlled" conditions to prevent any environmental damage to the area. As to the second area, the Forest Service imposed

"No Surface Occupancy" (NSO) restrictions; that is, exploration activities could be conducted only by means of directional drilling from surface locations outside the Lewis and Clark. *Id.*

Furthermore, preferred Alternative 7 did not allow for any oil and gas leasing activities in a portion of the Rocky Mountain Division known as the "Badger-Two Medicine Area" (Medicine Area), which contained an "identified cultural district" created to protect prehistoric and historic cultural sites, traditional cultural properties, and religious use by American Indians. Draft EIS, at II-3. Therefore, the Forest Service concluded that there would be no adverse effects from oil and gas leasing to any "traditional cultural properties in the [Medicine Area]." *Id.*

When the Draft EIS was released for public comment, Independent Petroleum Association of America ("IPAA"), a not-for-profit organization representing the nation's small and independent oil and gas producers, as well as some of its members, participated in the public comment process by expressing their support for the limited, environmentally sensitive oil and gas leasing proposed by Alternative 7.

On August 28, 1997, the Forest Service issued a Final EIS on oil and gas leasing in the Lewis and Clark. "Final Environmental Impact Statement September 1997." In the Final EIS the Forest Service modified its preferred alternative, Alternative 7, "to address concerns of the many people who took the time to respond to the Draft EIS." Final EIS Summary, at 4. In response to public comments about "social values placed on the Rocky Mountain Division," the Forest Service reduced the size of the leasable

areas by 20,000 acres, eliminated any leasing within grizzly bear habitat or near wilderness study areas, and prohibited all leasing within the Rocky Mountain Division except in those areas that could be explored and developed using directional drilling techniques from surface locations outside the Lewis and Clark. Final EIS, at II-16. Thereupon, the Forest Service re-affirmed its preference for Alternative 7:

> This alternative responds to public concern regarding oil and gas development on the Rocky Mountain Division . . . while providing limited opportunities to explore for oil and gas. . . . Leasing would be allowed in some areas on a 1-mile strip along the eastern perimeter of National Forest lands on the Rocky Mountain Division to provide opportunities to extract oil and gas resources beneath the National Forest from surface locations outside the forest boundary, using directional drilling techniques. *All other areas on the Rocky Mountain Division would not be leased.*

Final EIS Summary, at 4 (emphasis in original).

In the Final EIS, the Forest Service again confirmed its obligations:

> [t]o implement Congressional direction for oil and gas leasing . . . [and to] support, facilitate, and administer the orderly exploration, development, and production of mineral and energy resources on National Forest System lands to help meet the present and future needs of the Nation. The purpose of the proposed action is to contribute to the economic well-being of local communities and to the strategic interests of the nation while protecting other resource values.

Final EIS, Sec. I, at 7. The Forest Service also emphasized that leasing within the Rocky Mountain Division was essential to satisfy these strategic interests:

> The entire Rocky Mountain Division has been rated as having a high potential for the presence of hydrocarbons. Most of the past oil and gas activity, and projected future oil and gas activity, is located on the Rocky Mountain Division.

Final EIS, Sec. III, at 9.

On the same day that the Forest Service issued the Final EIS, the Forest Service also issued a final record of decision ("ROD") wherein the Forest Service admitted that oil and gas leasing activities within the Rocky Mountain Division would not harm the physical environment:

> This analysis as well as other previous analyses addressing oil and gas issues on the Rocky Mountain Division show that limited and closely controlled oil and gas exploration and development can take place in this area without significant negative impacts to wildlife or other surface resources values.

ROD at 5. Nevertheless, completely abandoning its position in the Final EIS, the Forest Service prohibited all oil and gas leasing in the entire Rocky Mountain Division in response to "emotions," "feel[ings]," and "perceptions" about oil and gas leasing activities:

> A majority of the concerns . . . were expressed regarding the 'value of place,' speaking in particular to social and personal values attributed to the Rocky Mountain Division. . . . Many *feel* that development of any kind, particularly oil and gas development, would 'ruin' the special feeling of the Front, *regardless of whether they ever saw or experienced the results of development*. Their *perceptions* about the value and spirituality of a place would be affected.

ROD at 4 (emphasis added). The Forest Service acknowledged further that those objections came from commenters who did not understand that oil and gas leasing

would not have any adverse impact upon the physical environment:

> Many of those who commented during the process admitted they have not read the environmental analysis and many may not fully understand – or care to understand – the analysis. They simply want to express their *heartfelt emotions* about a place they consider special.

Id. (emphasis added). The Forest Service admitted that these "value of place" concerns "figured prominently" in its decision to bar oil and gas leasing in the Rocky Mountain Division, even though "value of place" concerns were "difficult to quantify or [even to] describe," and even though these subjective, psychological concerns had never been discussed by the Forest Service as a possible basis for its decision. *Id.*

The Decisions Below

On March 7, 2000, the U.S. District Court for the District of Montana granted the Forest Service's motion for summary judgment, noting that because the "question of [IPAA's] standing is intertwined with the merits of the case, the court considers both simultaneously." App. 11. First, the District Court held that NEPA did not prevent the Forest Service from "allow[ing] public sentiment to override scientific approval of oil and gas leasing in the Rocky Mountain Division." App. 11. Second, the District Court held that IPAA's argument that "value of place" is not cognizable under either NEPA or NFMA "boil[s] down to semantics." App. 11. Third, the District Court held that, while the Forest Service never discussed the "value of place" criterion in either the Draft or Final EIS, the "value of place" criterion was "inextricably part of the recreation and tourism criteria." App. 11-12. Finally,

the District Court held, without any explanation, "the court finds a lack of standing to sue. . . . " App. 13.

On May 3, 2001, the United States Court of Appeals for the Ninth Circuit upheld the District Court's decision. The Ninth Circuit held that: (i) IPAA lacked Article III standing for its NEPA and NFMA claims "because the Forest Service has discretion whether to authorize the leasing of any particular Forest Service lands for mineral exploration." App. 2; (ii) IPAA had "no 'right' to bid for leases on Forest Service land" and, therefore, IPAA had suffered no "injury in fact" for purposes of Article III. App. 3; (iii) IPAA had no right "to compel the Forest Service to authorize leasing of its land for mineral exploration," therefore, IPAA had suffered no injury for purposes of Article III. *Id.*; (iv) IPAA had no "procedural right to the proper administration of [NFMA and NEPA]." *Id.*; (v) IPAA lacked prudential standing to raise its NEPA claims because "its interest in enforcing the statute is purely economic, and as such does not fall within NEPA's zone of interests." *Id.*; and (vi) the Forest Service's leasing decision was not arbitrary or capricious because, "the psychological effects of an agency's decision may be considered under NEPA." *Id.*

REASONS FOR GRANTING THE WRIT

I. THE NINTH CIRCUIT'S DECISION IS IN DIRECT AND INTOLERABLE CONFLICT WITH THE DECISIONS OF THIS COURT AND OTHER CIRCUIT COURTS REGARDING THE ARTICLE III "INJURY IN FACT" REQUIREMENT.

The Ninth Circuit held that IPAA lacks standing to challenge the Forest Service's no-leasing decision "because the Forest Service has discretion whether to authorize the leasing of any particular Forest Service lands for mineral exploration." App. 2. The Ninth Circuit

concluded, "[b]ecause the [MLA] gives the Forest Service this discretionary power, IPAA has no 'right' to bid for leases of its land for mineral exploration. Lacking such a right, IPAA suffered no injury in fact as a result of the Forest Service's decision not to lease . . . " App. 2-3.

The Ninth Circuit's opinion confuses the doctrine of judicial reviewability with the Article III "injury in fact" requirement. The legal tests applicable to the doctrine of judicial reviewability do not apply to the Article III analysis, and visa versa. Applying the holdings of this Court to each issue, it is clear that: (i) the no-leasing decision is subject to judicial review; and (ii) IPAA suffered an "injury in fact" and, therefore, has standing to challenge the no-leasing decision.

A. Parties Adversely Affected By Discretionary Agency Decisions Have Standing Except Where There Is Clear And Convincing Evidence Of A Contrary Legislative Intent Or Where There Is No Law To Apply.

All agency action is presumed to be judicially reviewable. "[O]nly upon a showing of 'clear and convincing evidence' of a contrary legislative intent should the courts restrict access to judicial review." *Abbott Laboratories v. Gardner*, 387 U.S. 136, 141 (1967). *See also, Barlow v. Collins*, 397 U.S. 159, 166 (1970) ("[J]udicial review of [federal] administrative action is the rule, and nonreviewability an exception which must be demonstrated.") The statutory and regulatory authority on which the Ninth Circuit relied provides no evidence whatsoever, let alone "clear and convincing evidence,"

that Congress intended the Forest Service's leasing decisions to be immune from judicial review.[3]

Additionally, the Ninth Circuit failed completely to apply the "generous review provisions" of the Administrative Procedures Act ("APA"), 5 U.S.C. §§ 551, *et seq.*, to the no-leasing decision, as required by *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 410 (1971). More specifically, in *Citizens to Preserve Overton Park*, this Court held that, under the APA, discretionary agency action is always judicially reviewable except "in those rare instances where statutes are drawn in such broad terms that in a given case there is no law to apply." *Id.* The NFMA, NEPA, and MLA are not drawn so broadly that there is "no law to apply." *Id.* In fact, the decisions of this Court are replete with holdings applying the law set forth in each of these statutes.

The Ninth Circuit's holding, that IPAA had no standing because the Forest Service's decision was discretionary, conflicts with this Court's holdings because there is no evidence that Congress intended to prohibit federal courts from reviewing oil and gas leasing decisions and because there is "law to apply" in determining whether the Forest Service, in making its leasing decision, complied with NFMA, NEPA, and MLA. This Court should grant *certiorari* to address that conflict.

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[3] For example, the Ninth Circuit cites a portion of the MLA that prohibits the Secretary of the Interior from issuing oil and gas leases on National Forest System Lands "over the objection of the Secretary of Agriculture." 30 U.S.C. § 226(h). Similarly, the Ninth Circuit cites several Forest Service regulations, which address and concern the creation of forest plans, but which do not speak to whether Congress intended to place the Forest Service's leasing decisions beyond judicial review. 36 C.F.R. § 219.10-219.12; 36 C.F.R. § 228.102(e).

B. Parties Wrongfully Denied The Opportunity To Bid On Federal Oil And Gas Leases Have Standing.

The "injury in fact" requirement is part of the Article III standing analysis well-known to this Court. To have standing under Article III, an organization must have suffered an " 'injury in fact' – an invasion of a legally protected interest which is (a) concrete and particularized . . . and (b) 'actual or imminent, not conjectural or 'hypothetical.' " *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992). The Ninth Circuit ruled that IPAA suffered no "injury in fact" as a result of the Forest Service's no-leasing decision because IPAA had no "right" to: (i) "bid for leases on any Forest Service land," or (ii) "compel the Forest Service to authorize leasing of its land for mineral exploration." App. 3.

1. When The Government Wrongfully Denies Parties An Opportunity To Bid For Valuable Rights Those Parties Suffer An Injury In Fact.

It is well established by the decisions of this Court that when the government wrongfully denies parties the opportunity to bid for valuable rights those parties suffer an "injury in fact."[4] For example, in *Bryant v. Yellen*, 447

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[4] Congress created a legally protectable "right to bid" for oil and gas leases on Forest Service lands as evidenced by the plain language of the MLA. Specifically, the MLA provides: "Lands within known geologic structures of a producing oil or gas field . . . shall be leased . . . to the highest responsible

U.S. 352 (1980), individualswishing to purchase lands within the boundaries of a special irrigation district sued the Secretary of Interior to enforce a provision in the reclamation laws that may have forced large landowners to sell their excess acreage at prices below the prevailing market price for irrigated land because that acreage could no longer be irrigated. 447 U.S. at 367. The Secretary argued that the individuals lacked standing because a court could not compel the large landowners to sell. Rejecting the Secretary's argument, this Court held that, even though the individuals "could not with certainty establish that they would be able to purchase excess lands," *Id.* at 367-68, the individuals had standing because it was "likely that excess lands would become available at less than market prices." *Id.* at 367-68. Like the individuals in *Bryant*, IPAA and its members have standing even though they cannot "with certainty establish that they would be able to [secure oil and gas leases]." Also, like the individuals in *Bryant*, IPAA and its members have standing because they are prepared to bid for oil and gas leases and because it is "likely" that lands in the Lewis and Clark "would become available" if the Forest Service complies with federal law in making its leasing decision.

Similarly, in *Northeastern Florida Chapter of the Associated General Contractors of America v. City of Jacksonville,*

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qualified bidder by competitive bidding. . . . The Secretary shall accept the highest bid from a responsible qualified bidder which is equal to or greater than the national minimum acceptable bid, without evaluation of the value of the lands proposed for lease. 30 U.S.C. § 226(b)(1)(A). IPAA is made up of numerous "responsible qualified bidder[s]" who have bid on and received oil and gas leases on federal land in the past.

508 U.S. 656, 666 (1993), an association of general contractors ("AGC") brought action against the City of Jacksonville challenging an ordinance that gave preferential treatment to certain minority-owned businesses in the awarding of city contracts. The Eleventh Circuit held that the association and its members lacked standing because they could not demonstrate that, "but for the program, any AGC member would have bid successfully for any of these contracts." *Id.* at 664. This Court reversed, holding that the association "need not allege that [it] would have obtained the [contracts] but for the barrier in order to establish standing." *Id.* at 666. Rather, the association had standing because its members had demonstrated that they were "able and ready to bid on [any] contracts" to be let in the future by the City. *Id.*

This Court reached the same holding in *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200, 210 (1995), when it held that a highway construction subcontractor had standing to challenge the legality of a federal highway construction program: "Adarand need not demonstrate that it has been, or will be, the low bidder on a Government contract." *Id.* at 211. Adarand had standing because it had made "an adequate showing that sometime in the relatively near future it will bid on another Government contract" and because Adarand had shown that it was "very likely to bid on each such contract. . . . " *Id.*

Like the parties in *City of Jacksonville* and *Adarand*, IPAA and its members have standing because they are "able and ready to bid" on any oil and gas leases issued within the Lewis and Clark and because they are "very likely to bid on each such [lease]." The Ninth Circuit's decision is in direct conflict with these decisions. This Court should grant *certiorari* to address this conflict.

2. The Ninth Circuit's Decision Denying Oil And Gas Companies Standing To Challenge Illegal Oil And Gas Leasing Decisions Creates A Direct And Intolerable Split With The Eighth Circuit.

In *Arkla Exploration Co. v. Texas Oil & Gas Corp.*, 734 F.2d 347, 353-54 (8th Cir. 1984), Arkla, an oil and gas company, sought to enjoin the BLM from issuing oil and gas leases to one of Arkla's competitors on the grounds that the BLM had determined improperly that the leases were outside of any "known geological structure" and, therefore, not subject to competitive bidding. The BLM argued that Arkla lacked standing to challenge its discretionary leasing decision; however, the Eighth Circuit rejected that argument:

> Arkla's asserted right is the right to bid competitively on . . . tracts of land which the Secretary has reasonably classified and offered. Correlatively, they assert the rights [1] to have the lands not classified arbitrarily, [2] to have the Secretary utilize his discretion properly, and the right [3] to bid for all properly categorized and offered KGS lands for potential profit and exploratory public benefit. . . . Moreover, a proper KGS determination will protect Arkla's interest [4] in having an opportunity to participate in a lawful bidding process. . . .

Id. at 353-54.[5]

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[5] The Eighth Circuit's holding as to Arkla's right (1) "to bid [on federal oil and gas leases]" and (2) to "an opportunity to participate in a lawful [oil and gas leasing] process" is consistent with the holdings of this Court in *Bryant*, *City of Jacksonville*, and *Adarand*.

Like Arkla, IPAA has the "right to have the [Forest Service] lands not classified arbitrarily, to have the [Forest Service] utilize [its] discretion properly, . . . to bid for all properly categorized and offered [Forest Service] lands. . . . [and] to participate in a lawful [oil and gas leasing] process." The Ninth Circuit's decision is in direct an intolerable conflict with the Eighth Circuit's decision. This Court should grant *certiorari* to address this conflict.

3. The Ninth Circuit's Decision Denying Oil And Gas Companies Standing To Challenge Illegal Oil And Gas Leasing Decisions Now Makes Two Expansive Circuits Part Of A Growing And Troublesome Split Among The Circuits.

The Ninth Circuit's decision now extends to two vast Circuits a view of standing that bars oil and gas operators from challenging any and all federal oil and gas leasing decisions.

In *Marathon Oil Company v. Babbitt, et al.*, 166 F.3d 1221, 1999 WL 3362 (10th Cir. 1999) (unpublished), *cert. denied*, 528 U.S. 819 (1999), Marathon, like IPAA before the Ninth Circuit, brought an action asserting that the BLM unlawfully failed to offer federal lands for oil and gas leasing. The Tenth Circuit affirmed the district court's decision holding that Marathon lacked standing to challenge the BLM's leasing decision because "[o]nly an order of [the district court] compelling the executive branch to make land available for competitive leasing. . . . would likely redress Marathon's claimed injuries." *Id.* at 1 (citing, *Marathon Oil Co. v. Babbitt*, 966 F.Supp. 1024, 1026 (D. Colo. 1997)). Similarly, the Ninth Circuit held that IPAA had no right "to compel the Forest Service to authorize leasing of its land for mineral exploration." App. 3.

Although the Tenth Circuit's decision turned on "redressability" and the Ninth Circuit's decision on "injury in fact," the result of both decisions is the same: oil and gas operators may not challenge illegal federal oil and gas leasing decisions. Neither of these decisions can be reconciled with the Eighth Circuit's *Arkla* decision that those seeking to bid on oil and gas leases on federal land have the right and thus the standing to challenge the proposed leasing decisions for failure to comply with federal law. *Arkla*, 734 F.2d at 353-54.

The Ninth Circuit's decision is in direct conflict with the decisions of this Court and with an important decision of the Eighth Circuit; moreover, the Ninth Circuit's decision expands a growing and nationally significant split between the Circuit Courts. That split is nationally significant because much of the nation's future energy supplies will come from the federal lands within these circuits. If the men and women who explore for, discover, and produce that energy are unable to sue to ensure compliance with federal mineral and environmental laws, valuable energy resources could be placed off limits illegally.[6] This Court should grant *certiorari* to address these conflicts.

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[6] Although the Ninth and Tenth Circuits are but two of the nation's 13 federal circuits, they cover a vast area that encompasses 93.3 percent of all federal lands in the country and that includes an estimated 80 percent of all onshore gas reserves and a substantial portion of the Nation's onshore oil reserves. "Public Land Statistics 1999," U.S. Dept. Of The Interior, Bureau of Land Management; "Report of the National Energy Policy Development Group," May 2001, Ch 5, p. 10.

C. Parties Who Are The "Object of The Action" At Issue Have Standing.

In *Lujan v. Defenders of Wildlife*, 504 U.S. 555 (1992), this Court held:

> When the suit is one challenging the legality of government action or inaction, the nature and extent of facts that must be . . . proved . . . in order to establish standing depends considerably upon whether the plaintiff is himself an object of the action . . . at issue. If he is, there is ordinarily little question that the action or inaction has caused him injury, and that a judgment preventing or requiring the action will redress it.

Id. at 561. In this case, the sole "action . . . at issue" was the Forest Service's decision as to whether to authorize oil and gas leasing within the Lewis and Clark. In fact, the solitary reason why the Draft EIS, Final EIS, and ROD were prepared was to comply with the Forest Service's new obligation under the 1987 MLA amendments. Those documents addressed only whether oil and gas leasing would be permitted in the Lewis and Clark; thus, IPAA and its members, oil and gas operators, were the "object of the [Forest Service's] action." Moreover, because the Forest Service's no-leasing decision prohibited any and all "oil and gas leasing" within the entire Rocky Mountain Division, IPAA and its members were barred from bidding for oil and gas leases there. Therefore, IPAA and its members are the "object of the [Forest Service's] action" and "there is . . . little question that the action . . . caused [them] injury" and that they have standing to challenge that action. *Id.*

The Ninth Circuit's decision clearly conflicts with the holding of this Court in *Lujan*. This Court should grant *certiorari* to address this conflict.

II. THE NINTH CIRCUIT'S DECISION IS IN DIRECT AND INTOLERABLE CONFLICT WITH THE DECISIONS OF THIS COURT AND SEVERAL CIRCUIT COURTS REGARDING THE "ZONE OF INTERESTS" TEST.

This Court has made clear that an organization has prudential standing whenever the interest it seeks to protect is "arguably within the zone of interests to be protected or regulated by the statute or constitutional guarantee in question." *Association of Data Processing Service Organizations, Inc. v. Camp*, 397 U.S. 150, 153 (1970). The zone of interests test is "not meant to be especially demanding." *Clarke v. Securities Industry Ass'n*, 479 U.S. 388, 399 (1987). A party need only demonstrate a "plausible relationship" between his interests and the policies to be advanced by the relevant section of the statute to meet the test. *Id.* at 399-400. In fact, a party's interest falls outside the "zone of interests" only if the interest is "so marginally related to or inconsistent with the purposes implicit in the statute that it cannot reasonably be assumed that Congress intended to permit the suit." *Id.* The Ninth Circuit's decision that IPAA lacked prudential standing to raise a NEPA claim "because [IPAA's] interest in enforcing the statute is purely economic, and as such does not fall within NEPA's zone of interests," App. 3, is in conflict with these and other related holdings of this Court.[7]

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[7] The Ninth Circuit recognizes that parties who suffer injury to their concrete interests have standing to raise their "procedural right" under NEPA. *See, e.g., Cantrell v. City of Long Beach*, 241 F.3d 674, 682 (9th Cir. 2001). The Ninth Circuit implicitly recognized this fact: when it cited [*Lujan v. Defenders of Wildlife*, 504 U.S. 555,] 572 n. 7. App. 3. That footnote reads: "The person who has been accorded a procedural right to protect his concrete interests can assert that right without

A. Under This Court's Decision in *Bennett v. Spear*, An Organization With Purely Economic Interests Has Prudential Standing To Raise A NEPA Claim.

The Ninth Circuit's holding cannot be reconciled with this Court's decision in *Bennett v. Spear*, 520 U.S. 154, 163 (1997). In *Bennett*, water users filed suit against the U.S. Fish and Wildlife Service to challenge a biological opinion issued under the Endangered Species Act ("ESA") that resulted in a loss of their water rights. The Ninth Circuit held that the water users lacked prudential standing because their interest was mostly economic and "only plaintiffs who allege an interest in the *preservation* of endangered species fall within the zone of interests protected by the ESA." 63 F.3d 915, 919 (9th Cir. 1995) (emphasis in original). This Court granted *certiorari* and reversed. In so doing, this Court reaffirmed the principle that whether an interest is "arguably protected [or regulated] within the meaning of the zone-of-interests test is to be determined not by reference to the overall purpose of the Act in question . . . but by reference to the particular provision of law upon which the plaintiff relies." *Bennett*, 520 U.S. at 175-76. The particular provision of the ESA at issue in *Bennett* was Section 7, which mandates that biological opinions be based upon "the best scientific and commercial data available." 16 U.S.C. § 1536(a)(2). Although this Court recognized that one objective of this requirement was "to advance the ESA's overall goal of species preservation," the Court also found:

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meeting all the normal standards for redressability and immediacy." However, because the Ninth Circuit failed to recognize IPAA's injury in fact, the Ninth Circuit erroneously held that IPAA had no "procedural right to the proper administration of the various environmental laws." App. 3.

> another objective (if not indeed the primary one) is to avoid needless economic dislocation produced by agency officials zealously but unintelligently pursuing their environmental objectives.

520 U.S. at 177. Thus, this Court ruled that the water users' "economic interests" were arguably within the zone of interests protected or regulated by Section 7 of the ESA.

Similarly, IPAA's economic interests are arguably within the zone of interests protected or regulated by NEPA. For example, NEPA expressly mandates that federal agencies use "all practicable means and measures [to] create and maintain conditions under which man and nature can exist in productive harmony, and fulfill the social, *economic,* and other requirements of present and future generations of Americans." 42 U.S.C. 4331(a) (emphasis added). NEPA also seeks to ensure the "widest range of beneficial uses of the environment." Moreover, the Council on Environmental Quality specifically requires federal agencies to analyze "economic" impacts if those impacts are interrelated with effects on the natural or physical environment. 40 C.F.R. § 1508.14. Thus, like the water users in *Bennett,* IPAA's economic interests arguably fall within the zone of interests protected or regulated by NEPA. Therefore, the Ninth Circuit's holding that "purely economic" interests "do[ ] not fall within NEPA's zone of interests" is in conflict with the holding of this Court in *Bennett.* This Court should grant *certiorari* to address this conflict.

B. The Eighth And Ninth Circuits Are Split As To Whether Purely Economic Interests Are Within NEPA's Zone Of Interests.

The Ninth Circuit's holding, that "purely economic" interests do not fall within NEPA's zone of interests, cannot be reconciled with the Eighth Circuit's decision in *Friends of Boundary Waters Wilderness v. Dombeck*, 164 F.3d 1115 (8th Cir. 1999). In *Friends*, commercial outfitters challenged a management plan that imposed restrictions on the number of motorboats within a wilderness area in the Superior National Forest in Minnesota. *Id.* at 1120. The District Court held that the outfitters lacked standing to assert any NEPA claims. On appeal, the Eighth Circuit reversed, holding that "the particular provisions [of NEPA] relied on by the outfitters indicate that the economic effects of proposed agency action must also be considered once it is determined that the proposed agency action significantly affects the physical environment." *Id.* at 1125.[8] The Eighth Circuit held further: "[t]he outfitters claim that they have standing because the Final EIS fails to consider adequately the economic impact on local economies. . . . These concerns are explicitly referenced in . . . NEPA . . . and in its implementing regulations." *Id.* at 1126. Finally, the Eighth Circuit held that the outfitters' economic interests fell within NEPA's zone of interests:

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[8] The Eighth Circuit relied on several specific provisions of NEPA, including § 4331(a), which requires federal agencies to "create and maintain conditions under which man and nature can exist in productive harmony, and fulfill the social, economic, and other requirements of present and future generations of Americans." *Id.* at 1126. (emphasis deleted). The Eighth Circuit also cited several CEQ regulations requiring federal agencies to examine, *inter alia*, the "economic" effects of agency action. *Id.*

> We need not consider whether the Outfitters are in fact more concerned with economics than with the welfare of the physical environment. Regardless of their true intent, they have standing to ensure that the agency adequately considers all of the statutorily referenced concerns when balancing the relevant factors in the Final EIS. . . . We hold that the Outfitters have standing to challenge the Final EIS on the grounds stated in their complaint because these claims are arguably within the zone of interests protected by NEPA.

Id. at 1127.

The Ninth Circuit's decision is in direct and intolerable conflict with the Eighth Circuit's decision in *Friends*. This Court should grant *certiorari* to address this conflict.

III. THE NINTH CIRCUIT'S DECISION IS IN DIRECT AND INTOLERABLE CONFLICT WITH DECISIONS OF THIS COURT AND OTHER CIRCUIT COURTS AS TO WHETHER AGENCY DECISION-MAKING MAY BE BASED ON ATTENUATED "PSYCHOLOGICAL HARMS" WHEN THERE IS NO CHANGE IN THE PHYSICAL ENVIRONMENT.

In *Metropolitan Edison Co. v. People Against Nuclear Energy*, 460 U.S. 766 (1983), this Court granted *certiorari* to determine whether purported "psychological harms" are cognizable under NEPA. In that case, the Nuclear Regulatory Commission ("NRC") authorized restart of a nuclear power plant without considering the purported "psychological harms" caused by the risk of an accident at the plant. An organization of residents living in the area claimed that NEPA required the NRC to consider these "harms" before authorizing the restart of the plant.

This Court held, however, that these purported "harms" are not cognizable under NEPA. *Id.* at 771. Although this Court noted that the "effects on human health can be recognizable under NEPA, and that human health may include psychological health," *Id.*, this Court interpreted the statutory language of NEPA to require "a reasonably close causal relationship between a change in the physical environment and the effect at issue." *Id.* at 774. With respect to the organizations' purported "psychological harms," it found no such relationship:

> [The organization] argues that the psychological health damage it alleges "will flow directly from the risks of [a nuclear] accident." . . . But a *risk* of an accident is not an effect on the physical world. In a causal chain from renewed operation of . . . [the nuclear reactor] to psychological health damage, the element of risk and its perception by [the organization] are necessary middle links. We believe that the element of risk lengthens the causal chain beyond the reach of NEPA.

Id. at 775. (emphasis in original). This Court also stressed that if NEPA required the consideration of psychological harms caused by a risk, it would place an unmanageable burden on federal agencies:

> If contentions of psychological health damage caused by risk were cognizable under NEPA, agencies would, at the very least, be obliged to expend considerable resources developing psychiatric expertise that is not otherwise relevant to their congressionally assigned functions. The available resources may be spread so thin that agencies are unable adequately to pursue protection of the physical environment and natural resources.

Id. at 776.

Finally, this Court stated that purported psychological harm based upon risk raised policy questions that fell outside of NEPA:

> Neither the language nor the history of NEPA suggest that it was intended to give citizens a general opportunity to air their policy objections to proposed federal actions. The political process, and not NEPA, provides the appropriate forum in which to air policy disagreements. . . . It would be extraordinarily difficult for agencies to differentiate between "genuine" claims of psychological health damage and claims that are grounded solely in disagreement with a democratically adopted policy.

Id. at 777-778. Thus, under *Metropolitan Edison*, only psychological harms that arise "out of [1] the direct sensory impact of [2] a change in the physical environment" are cognizable under NEPA. *Id.* at (Brennen, J., concurring).

The Second and Eighth Circuits have followed the teachings of *Metropolitan Edison*. *New York v. United States Dep't Transportation*, 715 F.2d 732, 751 (2nd Cir. 1983) ("fear is not a cognizable environmental impact under NEPA");[9] *Olmsted Citizens for a Better Community v. U.S.*, 793 F.2d 201, 204 (8th Cir. 1986) (fear of the risk of increased criminal activity not cognizable under NEPA). In the instant case, however, the Ninth Circuit turned this

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[9] Recently, the Second Circuit reaffirmed its adherence to *Metropolitan Edison* in *Cellular Phone Taskforce v. Federal Communications Comm'n*, 205 F.3d 82, 95 (2nd Cir. 2000) ("NEPA only requires agencies to consider environmental effects, *i.e.*, alterations to the environment that have a proximate effect on human health.")

Court's decision in *Metropolitan Edison* on its head and, thereby, created a split in the circuits.[10]

The Forest Service determined that oil and gas leasing in the Lewis and Clark would have no adverse impacts on the environment. ROD at 5 ("oil and gas exploration and development can take place in this area without significant negative impacts to wildlife or other surface resources"). Notwithstanding this determination, the Forest Service prohibited oil and gas leasing because:

> A majority of the *concerns*, however, were expressed regarding the "value of place," speaking in particular to social and personal values attributed to the Front. It is clear that this is a very unique and special place to many people; both those who live here in Montana as well as those who have visited or only heard about the area. Many of those who commented during the process admitted they have not read the environmental analysis and many may not fully understand – or care to understand – the analysis. They simply want to express *heartfelt*

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[10] Ironically, prior to the decision in the instant case, the Ninth Circuit had properly followed *Metropolitan Edison*. For example, in *Animal Lovers Volunteer Ass'n v. Weinberger*, 765 F.2d 937 (9th Cir. 1985), an animal rights group sued the Navy under NEPA for failing to consider the purported psychological harm that the Navy's killing of feral goats had on its members. Noting that the members of the animal rights group lacked access to the naval property on which the killing occurred, the Ninth Circuit ruled: "the NEPA zone of interests does not create a cause of action in persons claiming a psychological impact from a particular action . . . , unless, perhaps, the psychological injury arises out of the direct sensory impact of a change in the [members'] physical environment." *Id.* at 938 (quoting *Metropolitan Edison*, 460 U.S. 766, 778 (1983) (Brennen, J., concurring).

> *emotions* about a place they consider special. Many *feel* that development of any kind, particularly oil and gas development, would "ruin" the *special feeling* of the Front, *regardless of whether they ever saw or experienced the results of development*. Their *perceptions* about the *value and spirituality of a place* would be affected. Many *feel* that relatively undeveloped lands such as those on the Front are a diminishing resource, and increasingly hard to find. They point to its uniqueness in that sense. They also *feel* the need for oil and gas does not outweigh the intrinsic values of the lands in and along the Rocky Mountain Front.

ROD at 5 (emphasis added). Thus, in making its decision, the Forest Service considered the purported "psychological harm" not only as to events that would not change the physical environment but also as to persons who may never visit the Lewis and Clark.

The Ninth Circuit upheld the Forest Service's decision-making process by ruling, "psychological effects of an agency's decision may be considered under NEPA." App. 3. This Court, however, ruled in *Metropolitan Edison* that an agency may consider only "psychological harm" that arises "out of [1] the direct sensory impact of [2] a change in the physical environment." 460 U.S. at 779 (Brennan, J., concurring). In the instant case, there was a zero percent chance "of a change in the physical environment" because oil and gas leasing in the Lewis and Clark would have no adverse impacts on the environment. ROD at 5. Even if such a "change" did occur, it would not have a "direct sensory impact" on the majority of those opposing oil and gas leasing because they had no plans to visit the area: "Many feel that development of any kind, particularly oil and gas development, would ruin the special feeling of the Front, regardless of whether they

ever saw or experienced the results of development." *Id.* As a result, it is impossible for the purported "psychological harm" to arise "out of the direct sensory impact of a change in the physical environment."[11] Thus, the Ninth Circuit's decision is in direct conflict with *Metropolitan Edison*. This Court should grant *certiorari* to address this conflict.

CONCLUSION

The Ninth Circuit's decision is in direct and intolerable conflict with the decisions of this Court and the decisions of several Circuit Courts. This Court should grant *certiorari* to address these conflicts.

Respectfully submitted,

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[11] Thus, through its improper application of *Metropolitan Edison*, the Ninth Circuit sanctions two additional violations of federal law. First, by permitting consideration of the alleged "psychological harms" of those distant from the site of proposed federal action, the Ninth Circuit has turned NEPA in little more than a vote-counting contest. Second, by permitting "psychological harms" to be considered by the Forest Service under NEPA, the Ninth Circuit has allowed the Forest Service to circumvent NFMA, under which "psychological harms" are not cognizable.

NOT FOR PUBLICATION
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

ROCKY MOUNTAIN OIL & GAS ASSOCIATION, Plaintiff, and INDEPENDENT PETROLEUM ASSOCIATION OF AMERICA, Plaintiff-Intervenor-Appellant, v. UNITED STATES FOREST SERVICE, an agency of the United States Department of Agriculture; Defendant-Appellee, and MONTANA WILDERNESS ASSOCIATION; PROFESSIONAL WILDERNESS OUTFITTERS; BACK COUNTRY HORSEMEN OF MONTANA; THE WILDERNESS SOCIETY, INC.; SIERRA CLUB; MONTANA AUDUBON; NATIONAL WILDLIFE FEDERATION; KAA MO TAAN; GEORGE ENGLER, Defendant-Intervenors-Appellees.	No. 00-35349 D.C. CV-98-00022-CCL MEMORANDUM* (Filed May 3, 2001)

* This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by Ninth Circuit Rule 36-3.

Appeal from the United States District Court
for the District of Montana
Charles C. Lovell, District Judge, Presiding

Argued and Submitted April 2, 2001
Seattle, Washington

Before: THOMPSON, TROTT and PAEZ, Circuit Judges.

The Independent Petroleum Association of America ("IPAA") appeals the district court's grant of summary judgment in favor of the U.S. Forest Service. IPAA challenges the Forest Service's decision not to offer particular lands within the Lewis & Clark National Forest for oil and gas leasing, asserting claims under the National Environmental Policy Act ("NEPA"), 42 U.S.C. 4321-4370e (1994 & Supp. IV 1998), National Forest Management Act ("NFMA"), 16 U.S.C. §§ 1600, 1611-1614 (1994), Multiple-Use Sustained Yield Act ("MUSYA"), 16 U.S.C. §§ 528-531 (1994) and the Establishment Clause. The district court decided in favor of the Forest Service, holding that IPAA lacked standing to sue, and that it failed to establish that the Forest Service's decision was arbitrary, capricious or in violation of any law. We affirm on the basis that IPAA lacks standing to bring its NEPA, NFMA and MUSYA claims, all of which are brought under the Administrative Procedure Act ("APA"), 5 U.S.C. § 706 (1994), and that its Establishment Clause claim lacked merit.

IPAA lacks Article III standing for its NEPA, NFMA and MUSYA claims because the Forest Service has discretion whether to authorize the leasing of any particular Forest Service lands for mineral exploration. *See* 30 U.S.C. § 226(h) (1994); 36 C.F.R. §§ 219.10-219.12 (2000); 36 C.F.R. § 228.102(e) (2000). Because the statute gives the Forest

Service this discretionary power, IPAA has no "right" to bid for leases on any Forest Service land or to compel the Forest Service to authorize leasing of its land for mineral exploration. Lacking such a right, IPAA suffered no injury in fact as a result of the Forest Service's decision not to lease land in the Rocky Mountain Division. *See Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992). The absence of such a right also forecloses IPAA's argument that it has a procedural right to the proper administration of the various environmental laws. *See id.* at 572 n.7. We also note that IPAA lacks prudential standing on its NEPA claims because its interest in enforcing the statute is purely economic, and as such does not fall within NEPA's zone of interests. *See Presidio Golf Club v. Nat'l Park Serv.*, 155 F.3d 1153, 1157-58 (9th Cir. 1998).

IPAA contends the Forest Supervisor acted arbitrarily, in violation of the APA, in deciding not to lease the land because, in making that decision, she relied upon the Rocky Mountain Division's "value of place." IPAA styles this as an "ultra vires" claim, alleging that the Forest Supervisor acted outside of her authority. We reject this contention. The Forest Supervisor acted within her authority and in a non-arbitrary manner: the psychological effects of an agency's decision may be considered under NEPA, *cf. Metro. Edison Co. v. People Against Nuclear Energy*, 460 U.S. 766, 771-75 (1983), and the Supervisor had a reasoned basis for her decision.

In support of its Establishment Clause claim, the IPAA argues that the Forest Service's decision not to lease the land was based on the current use of the land for Native American religious practices. This argument fails.

The Forest Service's decision not to lease the land satisfies the three-part test of *Lemon v. Kurtzman*, 403 U.S. 602, 612-13 (1971). First, the Forest Service's decision had a secular purpose: the agency considered many secular factors, such as public concern about "value of place," impacts to wildlife and other surface resources, tourism and recreational uses and preservation of options for future use. Second, the primary purpose and effect of the decision not to lease was to protect the Rocky Mountain Division from oil and gas exploration, not to advance Native American religious beliefs. Third, the decision not to lease does not foster excessive entanglement with religion. Moreover, the government may, consistent with the Establishment Clause, accommodate religious practices in its decision-making processes. *See Lyng v. Northwest Indian Cemetery Protective Ass'n*, 485 U.S. 439, 453-54 (1988); *Hobbie v. Unempl. Appeals Comm'n of Fla.*, 480 U.S. 136, 144-45 (1987).

Nor does the Forest Service's decision violate the endorsement test of the Establishment Clause because, given the many secular considerations cited in the Forest Service's Record of Decision, a "reasonable observer" would not view the decision as an endorsement of religion. *See Capital Square Review & Advisory Bd. v. Pinette*, 515 U.S. 753, 778-79 (1995) (O'Connor, J., concurring).

AFFIRMED.

A TRUE COPY
CATHY A CATTERSON
Clerk of Court

ATTEST

JUN 26 2001

by: /s/ [Illegible]
Deputy Clerk

JUDGMENT

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UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

NO. 00-35349
CT/AG#: CV-98-00022-CCL

(Filed Jun. 29, 2001)

ROCKY MOUNTAIN OIL & GAS ASSOCIATION

Plaintiff

and

INDEPENDENT PETROLEUM ASSOCIATION OF AMERICA

Plaintiff-Intervenor-Appellant

v.

UNITED STATES FOREST SERVICE, an agency of the United States Department of Agriculture;

Defendant-Appellee

and

MONTANA WILDERNESS ASSOCIATION; PROFESSIONAL WILDERNESS OUTFITTERS; BACK COUNTRY HORSEMEN OF MONTANA; THE WILDERNESS SOCIETY, INC.; SIERRA CLUB; MONTANA AUDUBON; NATIONAL WILDLIFE FEDERATION; KAA MO TAAN; GEORGE ENGLER

Defendant-Intervenors-Appellees

APPEAL FROM the United States District Court for the USDC – Helena, Montana.

THIS CAUSE came on to be heard on the Transcript of the Record from the United States District Court for the USDC – Helena, Montana and was duly submitted.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court, that the judgment of the said District Court in this cause be, and hereby is affirmed.

Filed and entered: May 3, 2001

A TRUE COPY
CATHY A CATTERSON
Clerk of Court

ATTEST

JUN 26 2001

by: /s/ [Illegible]
Deputy Clerk

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MONTANA
HELENA DIVISION

* * *

ROCKY MOUNTAIN OIL & GAS ASSOCIATION

Plaintiff,

INDEPENDENT PETROLEUM ASSOCIATION OF AMERICA,

Plaintiff-Intervenor,

-v-

UNITED STATES FOREST SERVICE, an agency of the United States Department of Agriculture,

Defendant,

PROFESSIONAL WILDLIFE OUTFITTERS, et al.,

Defendant-Intervenors.

CV 98-22-H-CCL

OPINION AND ORDER

(FILED MAR 7 2000)

* * *

Before the court are the parties' cross-motions for summary judgment. The matter came on for hearing on February 17, 2000, and the case was argued by Charles Kaiser for the Plaintiff, by William Thode for Plaintiff-Intervenor, by Albert Lin for Defendant, and by James Angell for Defendant-Intervenors. The court, having heard oral argument and having carefully reviewed the briefs and the materials submitted by the parties, is prepared to rule.

Plaintiffs's "Complaint for Review of Administrative Action and for Declaratory Relief," filed May 21, 1998, asserts that the Record of Decision (ROD) issued by Defendant United States Forest Service ("Forest Service") is an unlawful agency decision violating the National Environmental Policy Act ("NEPA"), 42 U.S.C. § 4321 *et seq.*, the National Forest Management Act ("NFMA"), 16 U.S.C. § 1600 *et seq.*, the Multiple-Use Sustained Yield Act ("MUSYA"), 16 U.S.C. §§ 528-531, and the Administrative Procedure Act ("APA"), 5 U.S.C. §§ 501 *et seq.* Plaintiffs ask that the court declare the Forest Service decision not to issue oil and gas leases in the Rocky Mountain Division of the Lewis and Clark National Forest, effective for the next 7-12 years, to be violative of NEPA, NFMA, and MUSYA, and to be arbitrary, capricious and not in accordance with the law, in violation of the APA.

Standing

Defendant USFS and Defendant-Intervenors challenge Plaintiff and Plaintiff-Intervenor's standing to bring this action. Both Plaintiffs are trade associations whose members want the opportunity to obtain oil and gas leases in the Rocky Mountain Division.[1] The Defendants urge the court to take the view that Plaintiffs can show no injury in fact that could be redressed by a favorable decision. *See Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 118 S. Ct. 1003, 1012-16 (1998).

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[1] The Forest Service decision does not affect existing leases. AR Vol. 14, Doc. 1 at I-7 (FEIS).

Defendants' main point is that this court is unable to order the executive branch to issue oil and gas leases on the Rocky Mountain Division to Plaintiffs and that therefore no substantial likelihood exists that Plaintiffs' complaints can be redressed. *See* 30 U.S.C. § 226(a) (Mineral Leasing Act) ("All lands subject to disposition under this chapter which are known or believed to contain oil or gas deposits *may* be leased by the Secretary [of the Interior]." (emphasis added)). *See also Udall v. Tallman*, 380 U.S. 1, 4 (1965); *Arnold v. Morton*, 529 F.2d 1101, 1105 (9th Cir. 1976); *Burglin v. Morton*, 527 F.2d 485, 488 (9th Cir. 1975) (Secretary [of Interior] not obligated to issue oil and gas leases on government lands); 30 U.S.C. § 226(h) (Secretary of Interior may not lease land without consent of Secretary of Agriculture). Defendants also point out that a third-party not before the court, the Secretary of the Interior, exerts control over whether oil and gas leases are issued in the Rocky Mountain Division. *See Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561-62 (1992) (redressability not met when third party not before court controls issue).

Finally Defendants assert that prudential standing is absent because Plaintiffs have failed to identify precisely how they have been aggrieved under the APA within the meaning of a relevant statute. In this regard, Defendants argue that economic interests are not within the zone of interests of NEPA. *See Presidio Golf Club v. National Park Service*, 155 F.3d 1153, 1157 (9th Cir. 1998).

Merits of Plaintiffs' Complaints

Because the question of standing is intertwined with the merits of the case, the court considers both simultaneously.

Plaintiffs' argument under NEPA is essentially that it is unlawful for the Forest Service to allow public sentiment to override scientific approval of oil and gas leasing in the Rocky Mountain Division. This would be an odd rule of law to ascribe to NEPA, which has the goal of providing notice to the public of proposed agency action and an opportunity for public input. 42 U.S.C. § 4332(c); 40 C.F.R. § 1500.2(d) *Half Moon Bay Fishermans' Mktg. Ass'n*, 857 F.2d 505, 508 (9th Cir. 1988). While it is true that NEPA does not require agencies to obey public opinion, it is equally true that nothing in NEPA forces agencies to submit blindly to the proposals of agency scientists and technical staff. *See e.g., California v. Block*, 690 F.2d 753, 774 (9th Cir. 1982); *State Farm Mut. Auto. Ins. Co. v. Dole*, 802 F.2d 474, 488-89 (D.C. Cir. 1986).

Additionally, Plaintiffs' arguments that the "value of place" criterion was treated inconsistently in the FEIS as opposed to the ROD and that "value of place" is not a valid management criterion boil down to semantics, and are disingenuous at best. Plaintiffs also assert that they should have been given an opportunity to comment upon public comment, as if Plaintiffs occupied some middle strata between the public and the agency.

From the beginning of the scoping process in 1994, the public has been overwhelmingly concerned with the value of the place, i.e., the Rocky Mountain Division of the Lewis and Clark National Forest. The "value of place"

criterion is also inextricably part of recreation and tourism criteria. As Plaintiffs themselves point out, the majority of people commenting upon the DEIS did not want even the possibility of oil and gas technology spoiling the pristine scenery and diverse resources of the Rocky Mountain Division. Plaintiff-Intervenor's attempt to elevate these strong feelings about the place to a new age religion and then to call foul on the basis of violation of the Establishment Clause is simply without merit.[2]

There is nothing arbitrary and capricious or unlawful under NEPA arising from the Forest Service decision not to open the Rocky Mountain Division to oil and gas leasing because the agency gave the question a sufficiently hard look and considered public opposition and many other relevant factors. The ROD shows that the agency examined the relevant data, and the ROD articulates a rational explanation[3] for agency action. *See Motor*

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[2] Plaintiff-Intervenor's Establishment Clause argument and its ultra vires argument were not raised in the administrative appeals process and should be dismissed on failure to exhaust administrative remedies.

[3] The court will not attempt to articulate each and every basis upon which the decision rests, but the ROD lists the following factors to support the decision: (1) public comment; (2) information disclosed in the Final EIS; (3) presence of an identified traditional cultural district; (4) fact that two leaseholders presently willing to consider exchanging lease rights for offshore lease bidding credits; (5) Department of Energy projection that combined domestic and important natural gas supplies expected to keep pace with demand for next 15-20 years; (6) social values; (7) non-monetary or other use values; (8) revenue from tourism and recreational uses; (9) preservation of options for future use (whether for wilderness designation or multiple uses). Plaintiffs argument that the

Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 43 (1983). Plaintiffs' arguments under the NFMA and the MUSYA are irrelevant as the NFMA and the MUSYA do not apply to oil and gas leasing and because Amendment 21 to the 1986 Forest Plan was a non-significant amendment not requiring preparation of an environmental impact statement.

Arbitrary and capricious review cannot be conducted under the APA independent of another statute. *Oregon Natural Resources Council v. Thomas*, 92 F.3d 797, 797 (9th Cir. 1996). Here there is no such statute.

Conclusion

Having reviewed the administrative record, the briefs, declarations, and affidavits of all parties, and having heard oral argument, the court finds a lack of standing to sue and failure to establish that the agency's decision was arbitrary, capricious, or in violation of any law.

Accordingly,

IT IS HEREBY ORDERED that Plaintiff's motion for summary judgment (#53) and Plaintiff-Intervenor's motion for summary judgment (#50) are both DENIED. Defendant's cross-motion for summary judgment (#62) and Defendant-Intervenor's cross-motion for summary judgment (#59) are both GRANTED.

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decision was based on only one factor, "value of place," is simply false.

IT IS FURTHER ORDERED that Plaintiff's' complaint and Plaintiff-Intervenor's complaint are both DISMISSED, and all relief is DENIED. Let judgment enter accordingly.

The Clerk is directed forthwith to notify the parties of entry of this order.

Done and dated this 7th day of March, 2000.

/s/ Charles C. Lovell
CHARLES C. LOVELL
United States District Judge

UNITED STATES DISTRICT COURT

HELENA DIVISION DISTRICT OF MONTANA

ROCKY MOUNTAIN OIL & GAS ASSOCIATION,

Plaintiff,

V.

UNITED STATES FOREST SERVICE,

Defendant.

JUDGMENT IN A CIVIL CASE

CASE NUMBER: **CV-98-22-H-CCL**

[ ] **Jury Verdict.** This action came before the Court for a trial by jury. The issues have been tried and the jury has rendered its verdict.

[x] **Decision by Court.** This action came to trial or hearing before the Court. The issues have been tried or heard and a decision has been rendered.

Plaintiff's motion for summary judgment and Plaintiff-Intervenor's motion for summary judgment having been DENIED, and Defendant's cross-motion for summary judgment and Defendant-Intervenor's cross-motion for summary judgment having been GRANTED,

IT IS HEREBY ORDERED AND ADJUDGED the Plaintiff's complaint and Plaintiff-Intervenor's complaint are both DISMISSED, that the parties take nothing thereby, and that all relief is DENIED.

March 7, 2000
Date

LOU ALEKSICH, JR.
Clerk

DIANNE E. MANTZ
(By) Deputy Clerk

The Constitution of the United States of America; Article III, Section 2

The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution [or] the laws of the United States . . . [and to] Controversies to which the United States shall be a Party. . . .

Administrative Procedures Act (APA), 5 U.S.C. § 551, *et seq.*

§ 706 Scope of review

To the extent necessary to decision and when presented, the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action. The reviewing court shall --

(1) compel agency action unlawfully withheld or unreasonably delayed; and

(2) hold unlawful and set aside agency action, findings, and conclusions found to be --

(A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;

(B) contrary to constitutional right, power, privilege, or immunity;

(C) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right;

(D) without observance of procedure required by law;

(E) unsupported by substantial evidence in a case subject to sections 556 and 557 of this title or otherwise reviewed on the record of an agency hearing provided by statute; or

(F) unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court.

In making the foregoing determinations, the court shall review the whole record or those parts of it cited by a party, and due account shall be taken of the rule of prejudicial error.

National Environmental Policy Act of 1969 (NEPA), 42 U.S.C. § 4321, *et seq.*

§ 4321 Congressional declaration of purpose

The purposes of this chapter are: To declare a national policy which will encourage productive and enjoyable harmony between man and his environment; to promote efforts which will prevent or eliminate damage to the environment and biosphere and stimulate the health and welfare of man; . . .

§ 4331. Congressional declaration of national environmental policy

(a) Creation and maintenance of conditions under which man and nature can exist in productive harmony

The Congress . . . declares that it is the continuing policy of the Federal Government . . . to use all practicable means and measures, including financial and technical assistance, in a manner calculated to foster and promote the general welfare, to create and maintain conditions under which man and nature can exist in productive harmony, and fulfill the social, economic, and other requirements of present and future generations of Americans.

(b) Continuing responsibility of Federal Government to use all practicable means to improve and coordinate Federal plans, functions, programs, and resources

In order to carry out the policy set forth in this chapter, it is the continuing responsibility of the Federal Government to use all practicable means [to] . . .

(3) attain the widest range of beneficial uses of the environment without degradation, risk to health or safety, or other undesirable and unintended consequences;

. . . and

(6) enhance the quality of renewable resources and approach the maximum attainable recycling of depletable resources.

§ 4332. Cooperation of agencies; reports; availability of information; recommendations; international and national coordination of efforts

The Congress authorizes and directs that, to the fullest extent possible: . . . (2) all agencies of the Federal Government shall . . .

(C) include in every recommendation or report on proposals for legislation and other major Federal actions significantly affecting the quality of the human environment, a detailed statement by the responsible official on --

(i) the environmental impact of the proposed action,

(ii) any adverse environmental effects which cannot be avoided should the proposal be implemented,

(iii) alternatives to the proposed action, [and]

(iv) the relationship between local short-term uses of man's environment and the maintenance and enhancement of long-term productivity. . . .

(E) study, develop, and describe appropriate alternatives to recommended courses of action in any proposal which involves unresolved conflicts concerning alternative uses of available resources;

National Forest Management Act of 1976 (NFMA), 16 U.S.C. § 1600, *et seq.*

§ 1604. National Forest System land and resource management plans

(a) Development, maintenance, and revision by Secretary of Agriculture as part of program; coordination

As a part of the Program provided for by section 1602 of this title, the Secretary of Agriculture shall develop, maintain, and, as appropriate, revise land and resource management plans for units of the National Forest System, coordinated with the land and resource management

planning processes of State and local governments and other Federal agencies.

(b) Criteria

In the development and maintenance of land management plans for use on units of the National Forest System, the Secretary shall use a systematic interdisciplinary approach to achieve integrated consideration of physical, biological, economic, and other sciences.

* * *

(d) Public participation in management plans; availability of plans; public meetings

The Secretary shall provide for public participation in the development, review, and revision of land management plans including, but not limited to, making the plans or revisions available to the public at convenient locations in the vicinity of the affected unit for a period of at least three months before final adoption, during which period the Secretary shall publicize and hold public meetings or comparable processes at locations that foster public participation in the review of such plans or revisions.

* * *

(g) Promulgation of regulations for development and revision of plans; environmental considerations; resource management guidelines; guidelines for land management plans

As soon as practicable, but not later than two years after October 22, 1976, the Secretary shall . . . set out the process for the development and revision of the land

management plans, and the guidelines and standards prescribed by this subsection.

* * *

§ 1612. Public participation

(a) Adequate notice and opportunity to comment

In exercising his authorities under this subchapter and other laws applicable to the Forest Service, the Secretary by regulations, shall establish procedures, including public hearings where appropriate, to give the Federal, State, and local governments and the public adequate notice and an opportunity to comment upon the formulation of standards, criteria, and guidelines applicable to Forest Service programs.

LEWIS AND CLARK NATIONAL FOREST OIL AND GAS LEASING

FINAL ENVIRONMENTAL IMPACT STATEMENT

RECORD OF DECISION

Lewis and Clark, Teton, Pondera, Glacier, Cascade, Chouteau, Meagher, Park, Judith Basin, Wheatland, Fergus, Musselshell, Golden Valley, and Sweetgrass Counties

MONTANA

Prepared by:

U.S. DEPARTMENT OF AGRICULTURE – FOREST SERVICE
LEWIS AND CLARK NATIONAL FOREST
R-1, NORTHERN REGION

U.S. DEPARTMENT OF INTERIOR – BUREAU OF LAND MANAGEMENT
MONTANA STATE OFFICE

August 28, 1997

[1] I. INTRODUCTION

Purpose and Description of the Record of Decision (ROD)

This ROD documents the Forest Service decisions concerning which lands will be administratively available for oil and gas leasing in accordance with 36 CFR 228.102(d) and which lands specifically the Forest Service is authorizing the BLM to offer for lease in accordance with 36 CFR 228.102(e) and Forest Service policy.

The Mineral Leasing Act of 1920 (as amended) provided that all public lands are open to oil and gas leasing, unless a specific land order or law has been issued to

close an area. The Federal Onshore Oil and Gas Leasing Reform Act was enacted by Congress in 1987 and gave the Secretary of Agriculture additional responsibilities for leasing decisions. Implementing regulations for the U.S. Department of Agriculture at 36 CFR 228 and the Department of Interior at 43 CFR 3100 were finalized and published in the Federal Register on March 21, 1990, and June 17, 1988, respectively. The regulations set forth the procedures by which the Forest Service and the Bureau of Land Management (BLM) will carry out their statutory responsibilities in the issuance of oil and gas leases.

These decisions incorporate the lease terms and stipulations determined necessary to mitigate effects to surface resources. These measures are based on analyses documented in the Lewis and Clark National Forest Oil and Gas Leasing Final Environmental Impact Statement (Final EIS) and the Lewis and Clark National Forest Land and Resource Management Plan (Forest Plan).

These decisions were guided by the results of a comprehensive analysis that considered the cumulative effects of activities on the current and future resources, economics, and social patterns of this highly sensitive area. Also considered was a great deal of public comment expressed both in favor of and against leasing in the Lewis and Clark National Forest; comments received not only at this time, but also over the past two decades on this issue. Although this input may not necessarily reflect the opinion of all affected or interested people, these decisions attempt to balance the conflicting viewpoints and resource concerns.

Decisions of this nature, which may have a lasting effect on a very significant area, do not come easily. Oil and gas leasing, and subsequent actions, have been a contentious issue, particularly on the Rocky Mountain Division; an area considered to have high potential for significant hydrocarbons resources while also valued for its wildlife, recreational, cultural and aesthetic qualities. The fact the area in question is held in the highest regard by many people who have never even seen it, makes decisions of this nature even more difficult. As such, none of the pertinent information or substantive comments were taken lightly; all of this information figured into the final analysis in some way. It is important for the reviewer to know these factors were closely considered in the attempt to arrive at a decision which is a balance between conflicts, public opinion, opportunities, supply and demand, resource capability, and the needs of future generations.

This ROD also documents the Forest Service decision to amend the Lewis and Clark National Forest Plan regarding which lands are administratively available for oil and gas leasing and where the Selected Alternative differs from the Forest Plan Standards or Management Direction.

This ROD documents the BLM decision to use the Final Lewis and Clark National Forest Oil and Gas Leasing Environmental Impact Statement as its National Environmental Policy Act (NEPA) compliance document for: 1) offering lands for lease within the Jefferson Division of the Lewis and Clark National Forest subject to stipulations identified in this ROD, and 2) making private surface/federal minerals within the administrative boundaries of the Jefferson Division of the Lewis and Clark National Forest open for oil and gas leasing.

Purpose and Need for the Action

The purpose and need of this project is, first, to comply with Congressional intent. In response to the Leasing Reform Act, and in accordance with 36 CFR 228.102, the Forest Service must determine which lands in the Lewis and Clark National Forest are administratively available for oil and gas leasing, and determine which [2] specific lands in the Lewis and Clark National Forest the Forest Service will authorize the BLM to offer for lease. The detailed purpose and need for this analysis can be found in the Final EIS on pages 1-7 and 8.

Geographic Scope

The geographic scope of the analysis area for determination of both the Availability Decision and the Leasing for Specific Lands decision is identified by the boundaries shown on the accompanying maps. The area contains all of the lands administered by the Lewis and Clark National Forest. The area is located in portions of Lewis and Clark, Teton, Pondera, Glacier, Cascade, Chouteau, Meagher, Park, Judith Basin, Wheatland, Fergus, Musselshell, Golden Valley, and Sweetgrass Counties in Central Montana. Within the analysis area there are 1,829,609 acres with Federal jurisdiction of surface use and Federal jurisdiction of minerals. There are an additional 32,966 acres of split estate lands and outstanding mineral reserved rights for oil and gas.

II. DECISIONS AND RATIONALE FOR THE DECISIONS

I have selected from two alternatives displayed in the Final EIS for the availability and leasing decisions. I am selecting Alternative 1(a) for the Rocky Mountain Division. No lands on the Rocky Mountain Division will be offered for lease. Map II-1 displays Alternative 1(a) for the Rocky Mountain Division. I am selecting Alternative 7 for the Jefferson Division. Certain lands on the Jefferson Division will be offered for lease with stipulations to protect resource values. Map II-16 displays the areas that will be offered for lease and the stipulations that will apply on the Jefferson Division.

Under the implementing regulations, the Forest Service has two decision points relating to oil and gas leasing. In this instance, the Forest Service has decided to combine the Lands Administratively Available Decision, with the Leasing of Specific Lands Decision. Both of these decisions are documented in this Record of Decision. Once these decisions have been made, the Forest Service will have authorized the BLM to offer specific lands for lease subject to appropriate stipulations. After the lands have been leased, the lessee can file an Application for Permit to Drill (APD). An APD must go through further site-specific NEPA analysis and decisionmaking (36 CFR 228.105-109).

The Leasing Reform Act of 1987 modified the authorities of the Secretaries of Interior and Agriculture. The Forest Service developed implementing regulations which defined the procedures to be used and established the

foundation for decision-making. The Final Rule was published in the Federal Register on March 21, 1990 (36 Code of Federal Regulations, Part 228, 100 et seq; 55 FR 10423).

As we continue discussions in this document we will refer to 228.102 (d), as the Availability Decision, and the 228.102 (e), as the Leasing for Specific Lands decision. Both of these decisions must occur prior to the time the BLM offers specific National Forest System lands for lease.

The following text describes this decision process.

* * *

[4] *B. LEASING DECISION – 36 CFR 228.102(E) – Leasing for Specific Lands Decisions*

The Availability Decision and the Leasing Decision are related to each other in that the leases authorized will be on lands earlier found to be Administratively Available for Leasing, and each lease will include the stipulations determined to be necessary in the specific leasing decision.

I have reviewed the availability decision on which lands are administratively available for leasing and authorize the BLM to offer specific lands for lease subject to:

1. Verifying oil and gas leasing on the specific lands has been adequately addressed in a NEPA document, and is consistent with the Forest Plan.

2. Ensuring conditions of surface occupancy identified in Section 228.102(c)(1) are properly included as stipulations in resulting leases.

3. Determining operations and development could be allowed somewhere on each proposed lease, except where stipulations will prohibit all surface occupancy.

In this decision, the Forest Service does make specific decisions to authorize leases on individual, specified areas of land.

Lands Available but Not Offered for Lease at this Time and Rationale for Decision

Regulations under 36 CFR 228.102(e) allow the Forest Service to authorize the BLM to offer *specific* lands for lease. The regulations do not obligate the Forest Service to offer all administratively available lands for lease. The options to the Forest Service include lease all *available* lands, or NOT lease any of the available lands, or to lease some specific lands at this time with varying stipulations to protect federal resources.

Based on public comment and the information disclosed in the Final EIS, I am selecting Alternative 1(a) for the leasing decision on the Rocky Mountain Division and Alternative 7 for the leasing decision on the Jefferson Division. My decision is to NOT LEASE the following administratively available lands at this time:

- **The entire Rocky Mountain Division.** The presence of an identified traditional cultural district in the RM-1 Geographic Unit (also known as the Badger-Two Medicine area), and potential impacts to this area from oil and gas leasing and development, are compelling reasons to not offer this geographic unit for lease. In addition, most of this area

is presently under lease. The terms of these leases have been suspended by the Bureau of Land Management pending review of the information regarding traditional cultural uses in the area. The existing leases have between 3 and 7 years remaining on their 10-year terms once the suspension is lifted. Two leaseholders have entered into discussions with the Department of Interior in regards to the possibility of trading out of lease rights in the Badger-Two Medicine. Chevron and FINA have indicated that they would be willing to consider accepting bidding credits on offshore leases in exchange for their lease rights in the Badger-Two Medicine. While discussions involving such possibilities are by no means close to being final, the fact that such action is being considered is also compelling reason not to lease these lands in the near future.

The vast majority of those responding to the Draft EIS were strongly against any development for the purposes of oil and gas exploration in the Lewis and Clark National Forest, particularly on the [5] Rocky Mountain Front (the Front), which is within the Rocky Mountain Division. Concerns expressed include potential impacts to wildlife and other surface resources. A majority of the concerns, however, were expressed regarding the "value of place," speaking in particular to social and personal values attributed to the Front. It is clear that this is a very unique and special place to many people; both those who live here in Montana as well as those who have visited or only heard about the area. Many of those who commented during

the process admitted they have not read the environmental analysis and many may not fully understand – or care to understand – the analysis. They simply want to express heartfelt emotions about a place they consider special. Many feel that development of any kind, particularly oil and gas development would "ruin" the special feeling of the Front, regardless of whether they ever saw or experienced the results of development. Their perceptions about the value and spirituality of a place would be affected. Many feel that relatively undeveloped lands such as those on the Front are a diminishing resource, and increasingly hard to find. They point to its uniqueness in that sense. They also feel the need for oil and gas does not outweigh the intrinsic values of the lands in and along the Rocky Mountain Front. Indeed, while the Department of Energy projects an increase in natural gas consumption over the next XV-XX years, combined domestic and imported natural gas supplies are expected to keep pace with this demand.

This analysis, as well as other previous analyses addressing oil and gas issues on the Rocky Mountain Division, show that limited and closely controlled oil and gas exploration and development can take place in this area without significant negative impacts to wildlife or other surface resource values. I also understand that oil and gas technologies have made significant advances in reducing impacts to sensitive areas such as the Rocky Mountain Division, and I expect that these technologies will continue to improve in the future. But, the effects of such activities on

social values and human needs and desires are much more difficult to quantify or describe. These difficult concepts have been at the crux of the issue regarding management and uses (particularly oil and gas leasing and development) along the Rocky Mountain Front for many years. The Forest has tried to recognize these social and emotional values and they have figured prominently in my decision not to lease the Rocky Mountain Division. I have considered social values as well as scientific values and recognize the importance of both. There are many disparate viewpoints on the subject of oil and gas leasing and development along the Rocky Mountain Front. It would be an impossible task to please all points of view on this subject.

I recognize that the Rocky Mountain Division has high potential for the occurrence of hydrocarbons, even though there are differing opinions on specific estimates of the amount of hydrocarbon resources. Development of these resources could provide economic benefits to local economies as well as the State of Montana and Federal Government. Some have contended that not allowing oil and gas development on National Forest System lands on the Front will mean that development on adjacent private lands is less attractive and potential revenues from private drilling may be lost. I realize that possible oil and gas revenue has been an important consideration for the State of Montana, as well as some local communities, who are looking for new or additional revenue sources to the economy. It could also be

argued that non-monetary or other use values are higher, however, and could result in more revenue from tourism and recreational uses, over time, than alternatives that allow oil and gas development. These, too, are difficult comparisons to make.

The argument has been made that not allowing leasing on the Rocky Mountain Division does not meet Congressional intent for mineral leasing or Forest Service mineral policy. Forest Service mineral policy in relation to minerals management is to encourage, facilitate, and administer the orderly exploration, development, and production of mineral and energy resources on National Forest System lands to help meet the present and future needs of the Nation. It is also policy to ensure the integration of mineral resources through the land and resource management planning process. The analysis documented in the Final EIS is part of that planning process. While my decision will not offer the Rocky Mountain Division for lease at this time, these lands have not been withdrawn nor made administratively unavailable for leasing. In addition, lands on the Jefferson Division identified as having moderate potential for the occurrence of oil and gas would be offered for lease with stipulations.

[6] From the number and context of most of the comments I have received, I feel not leasing the Rocky Mountain Division at this time will preserve options for future use of these lands, whether that be for wilderness designation or other multiple uses. By keeping these lands as administratively available, I

am not foreclosing future options for reconsidering this leasing decision should the need arise. The temporal scope of this analysis is considered to be 10 to 15 years, similar to most other planning documents. The Forest Service has the opportunity to review this analysis and decision any time conditions change from the present.

- **Inventoried lands adjacent to Wilderness Study Act areas**. These are lands that border wilderness study areas in the Big Snowy Mountains and Middle Fork Judith River in the Little Belt Mountains. These lands were analyzed, along with lands identified in the 1977 Montana Wilderness Study Act, as to their suitability for wilderness inclusion. While the Lewis and Clark Forest Plan did not recommend these lands for wilderness, Forest Plan direction is to manage them so as to maintain their wilderness character pending final Congressional action. For this reason, I will not authorize leasing on these adjacent inventoried roadless lands at this time. Because exact boundaries of some of these areas have not been finalized, I have included small acreages of land that may or may not be part of the inventoried roadless area. In addition, I have decided not to lease the road corridor leading to the Crystal Lake recreation area in the Big Snowy Mountains. This road corridor is fairly confined with limited occupancy opportunities and receives high recreational use. I feel oil and gas development in this corridor is not compatible with existing uses.

- **River segments considered to be eligible for "wild river" designation under the Wild and Scenic Rivers Act.** Consistent with present Forest Plan direction, these river segments will not be offered for lease at this time.

I feel that it is not appropriate to consider offering these lands for leasing at this time for the reasons stated. However, if the situation changes in the future, I will reconsider this decision. I will do this through the appropriate NEPA documentation that will include public involvement and an analysis to determine appropriate stipulations to include to provide the needed surface resource protection.

This decision will apply to lands currently under lease *when those leases terminate or expire.*

* * *

[1] SUMMARY

PURPOSE OF THIS EIS

The Environmental Impact Statement (EIS) analyzes what lands in the Lewis and Clark National Forest (Forest) could be available under certain conditions for leasing and subsequent oil and gas exploration and development. It describes alternatives and discloses and evaluates potential effects on the environment, other resources, and resource development opportunities.

PROPOSED ACTION

The Forest Service proposes to implement the management direction found in the 1986 Lewis and Clark

National Forest Plan. Under current Forest Plan direction, 1,231,632 acres would be available for oil and gas leasing. These lands would be available subject to constraints and management direction found in the plan.

Within the Forest, all lands would be available for leasing *except* existing and Forest Plan recommended wilderness (Management Areas P and Q in the Forest Plan), Wilderness Study areas (Big Snowy and Middle Fork Judith), **permitted ski areas**, and stream segments eligible for wild status under the Wild and Scenic Rivers Act.

The proposed action serves as a starting point for the analysis. It is not necessarily the action that is preferred for implementation. Through this analysis, another alternative (Alternative 7) has been identified as the Preferred Alternative.

PURPOSE AND NEED

The purpose and need for the proposed action are:

- To ensure that oil and gas leasing analysis and decisionmaking are conducted according to regulations for the Federal Onshore Oil and Gas Leasing Reform Act of 1987 (36 CFR 228E).

- To implement Congressional direction for oil and gas leasing (Mineral Leasing Act of 1920, Mineral Leasing Act for Acquired Lands of 1947, Mining and Minerals Policy Act of 1970, National Materials and Minerals Policy, Research and Development Act of 1980, and the Federal Onshore Oil and Gas Leasing Reform Act of 1987).

- To ensure orderly development and conservation of the oil and gas resource (Forest Service Policy at FSM 2800 and 1990 RPA Program).

- To respond to interest and activity by the energy industry in oil and gas exploration and development in and adjacent to the Lewis and Clark National Forest.

- To implement Forest Plan goals, objectives, standards, and management direction for oil and gas leasing.

DECISIONS TO BE MADE

The Forest Service and the BLM, Federal agencies with separate responsibilities for lands within the project area, will make the following decisions based on the EIS:

- The Forest Supervisor will decide, within the Lewis and Clark National Forest EIS project area, if the availability decision made in the 1986 Forest Plan is appropriate. A new decision may be made as to which (if any) National Forest System lands are administratively available for oil and gas leasing, and under what conditions (lease stipulations). The availability decision is *not* a commitment to lease any lands. It simply sets the conditions under which lands could be leased while meeting Forest Plan standards and surface resource protection needs.

- The Forest Supervisor will decide what specific National Forest System lands, if any, the BLM will be authorized to offer for lease, subject to the Forest Service ensuring correct stipulations will be attached to leases issued by the BLM.

- The Forest Service will decide whether amendments to the 1986 Lewis and Clark National Forest Plan are necessary if an alternative other than the Proposed Action is selected.

- The BLM will decide whether or not to offer for lease the specific lands authorized by the Forest Service, and whether or not to lease non-Federal lands with Federal mineral ownership (split-estate lands) within the boundary of the Lewis and Clark National Forest.

* * *

[4] Alternative 7 – Preferred ~~(Replacement Maps 15 and 16)~~

This alternative responds to public concern regarding oil and gas development on the Rocky Mountain Division (a large number of public comments opposed oil and gas leasing and development in that portion of the Forest) while providing limited opportunities to explore for oil and gas. Oil and gas leasing and possible development would be allowed (with stipulations) within a one-mile corridor along either side of existing roads in the Blackleaf, Elk Creek, and Cuniff Basin areas only, on the Rocky Mountain Division. **Areas adjacent to these roaded corridors and in the Falls Creek area are stipulated by No Surface Occupancy to protect grizzly bear habitat while allowing for removal of oil and gas resources adjacent to areas in which occupancy is allowed.** Leasing with No Surface Occupancy would be allowed **in some areas** on a 1-mile strip along the eastern perimeter of National Forest lands on the Rocky Mountain Division to provide opportunities to extract oil and gas resources beneath the National Forest from surface locations outside the forest

boundary, using directional drilling techniques. *All other areas on the Rocky Mountain Division would not be leased.*

Included in the areas that would not be offered for lease is the RM-1 Geographic Unit (Badger-Two Medicine area) on the Rocky Mountain Division. Although some of the area is not currently leased, most of the area is already under lease and existing leases are under suspension. When the suspension is lifted, those leases will have from 3 to 7 years remaining on their 10 year lease term. In addition, final determination of boundaries for an identified traditional cultural district are still pending.

Similar to Alternative 6, this alternative is also designed to provide consistent management direction for road construction to access surface and subsurface resources in Management Areas F and G (on the Jefferson Division). This alternative allows leasing within a one-mile corridor of existing roads in Management Area G and applies a NSO stipulation to the remainder of the Management Area. A NSO stipulation would apply to all of Management Area F. In addition, this alternative would apply a NSO stipulation to watersheds supporting either "managed as pure" or "indicator" populations of westslope cut-throat trout.

Because of limited occupancy opportunities and high recreation use, the access corridor to Crystal Lake in the Big Snowy Mountains would not be leased. This corridor is surrounded by Wilderness Study Area lands. **A small area outside, but mostly surrounded by, inventoried roadless lands on the south side of the Big Snowy Mountains is also included in the No Lease Lands.**

The Prefered Alternative 7 was modified slightly from the Draft EIS to address concerns of the many people who took the time to respond to the Draft EIS. For example, changes to the preferred alternative presented in the Draft EIS were made to address concerns for leasing with NSO along a one-mile strip on the east edge of the Rocky Mountain Division. Where surface occupancy on lands adjacent to the Forest was not feasible, due to land management constraints, lands within the Forest were changed to No Lease. It was felt that no opportunities existed for directionally drilling to subsurface resources beneath the Forest in these areas. Complications regarding Federal drainage demands issues were also considered.

Consideration of critical grizzly bear habitat in the Cow Creek area on the Rocky Mountain Division resulted in applying a No Surface Occupancy stipulation to that area.

[5] It also incorporates new information received following release of the Draft EIS, including new information regarding additional watersheds supporting pure strain and introgressed populations of westslope cutthroat trout. In addition, permitted ski areas have now, by law, been withdrawn from mineral leasing. The Showdown and Teton Pass ski areas are now legally unavailable.

* * *

[7] D. PURPOSE AND NEED

The purpose and need for the proposed action includes:

■ *To ensure that oil and gas leasing analysis and decision-making are conducted according to regulations for the Federal Onshore Oil and Gas Leasing Reform Act of 1987 (36 CFR 228E).*

Section 228.102(b) of the Code of Federal Regulations (CFR), Title 36, requires Forest Supervisors to develop a schedule for conducting leasing analyses. The Lewis and Clark National Forest was given high priority for completion of a Forest-wide leasing analysis.

Section 228.102(c) gives requirements for leasing analysis procedures and documentation. Sections 228.102(d) and 228.102(e) specify two leasing decisions, (1) "availability" and (2) "authorization to lease specific lands." The availability decision does not commit any lands to leasing, it just sets out terms under which leasing might be allowed in balance with forest plan direction. Although the availability decision was made in the 1986 Lewis and Clark Forest Plan, that plan was completed before the Leasing Reform Act regulations took effect. Therefore, we need to audit the availability decision to ensure it is supported by analysis and documentation conforming to the current regulations. We then need to complete the scheduled analysis to conclude with a lease authorization decision for lands within the Lewis and Clark National Forest.

The 228 regulatory schedule and leasing analysis is prospective in that the purpose of the analysis is to determine which lands will be made available and offered for lease for a time period of the next 15 years.

Decisions made through this analysis will be applied to leasing actions made during that time-frame. As such, it is not the purpose of this action nor was it intended to consider terminating existing lease rights or that determinations made as a result of this analysis be retroactively applied to existing leases.

■ *To implement Congressional direction for oil and gas leasing (Mineral Leasing Act of 1920, Mineral Leasing Act for Acquired Lands of 1947, Mining and Minerals Policy Act of 1970.*

Under those laws, the mission of the Forest Service in relation to minerals management is to support, facilitate, and administer the orderly exploration, development, and production of mineral and energy resources on National Forest System lands to help meet the present and future needs of the Nation.

The purpose of the proposed action is to contribute to the economic well-being of local communities and to the strategic interests of the nation while protecting other resource values.

■ *To ensure orderly development and conservation of the oil and gas resource (Forest Service Policy at FSM 2800 and 1990 RPA Program).*

The 1990 Resource Planning Act (RPA) Program provides general policy guidance at the National level based on a five-decade projection into the future. The Forest Service has defined nine roles in its basic National strategic plan.

Multiple-use management, contributions to rural development, and management in situations of mixed ownership are three of those roles. The issue of minerals development is described in the 1990 RPA Program as:

> "The mineral resources within the National Forest System significantly affect the economic well-being of local communities and the strategic defense of the Nation. The public is concerned about the effects of minerals development on other resource values and on the environment."

In the 1990 RPA Program, the long-term strategy for minerals is to meet most demands for access to explore and develop mineral resources, except when doing so would pose unacceptably high risks to other resources.

■ [8] *To respond to interest and activity by the energy industry in oil and gas exploration and development in and adjacent to the Lewis and Clark National Forest.*

As previously mentioned, over 26,000 acres on the Forest have lease applications pending. No decision will be made on those leases, or any other leases on the Forest, until completion of this analysis. Several areas on the Forest have had high levels of oil and gas industry interest, and four drilling proposals have been received. Drilling proposals have also been submitted for locations adjacent to the Forest along the Rocky Mountain Front. The results of those efforts could spur increased interest in oil and gas activity, including leasing, on the Forest.

■ *To implement forest plan goals, objectives, standards, and management direction for oil and gas leasing.*

The Forest Plan balances multiple uses and long-term net public benefits, aiming to protect natural resources while providing for a sustained yield of goods and services. The Forest Plan guides all natural resource management activities including oil and gas leasing, and establishes resource management standards. Through the analysis of this proposed action and alternatives presented in this EIS, we need to validate the availability and stipulation decisions made in the Forest Plan, ensure proper mapping and justification for stipulations, and, if necessary, identify corrections or amendments to the Forest Plan.

E. FOREST PLAN MANAGEMENT DIRECTION

The general management direction for the Lewis and Clark National Forest is found in the Forest Land and Resource Management Plan, referred to as the Forest Plan. The Forest Plan provides two levels of direction: Forest-wide standards and specific direction for sub-units within the Forest called management areas. The long range goals for the Lewis and Clark Forest include:

Goal No. 6 – Facilitate exploration and development of the mineral resources while protecting other resources through mitigating stipulations (Forest Plan, page 2-2).

Forest-wide objectives state: (Forest Plan, page 2-7) "Approximately 1.4 million acres of National Forest land on the Lewis and Clark National Forest, including potentially oil and gas-rich lands in the Rocky Mountain Division, are available for mineral entry and leasing under the Forest Plan. Mineral access, exploration, and development activities will be accomplished in a manner consistent with plan requirements for management of other

resources and uses. Within this frame-work, the plan provides for resource coordination and identifies stipulations and restrictions to ensure that oil and gas activities comply with plan requirements. The standards provided in the "Environmental Assessment on Oil and Gas Leasing on Non-Wilderness Lands" (February 1981) and "Environmental Assessment of Geophysical Exploration on Non-Wilderness Lands (July 1982) were analyzed in the planning process and brought forward into the Forest Plan to ensure consistency in management of oil and gas activities. Activities authorized under the mining laws will be administered under the appropriate regulations and according to the Forest Plan. All mineral activities that result in soil disturbance have required reclamation to prevent erosion and increased stream sediment."

* * *

[16] **ALTERNATIVE 7 (Preferred Alternative)** – This alternative responds to public concern regarding oil and gas development on the Rocky Mountain Division, it allows for limited occupancy opportunities while **addressing social values placed on the Rocky Mountain Division and** protecting grizzly bear management situation one habitat. Oil and gas leasing and possible development would be allowed (with stipulations) within a one-mile corridor along either side of existing roads in the Blackleaf, Elk Creek, and Cuniff Basin areas only on the Rocky Mountain Division. **Areas adjacent to these roaded corridors and in the Falls Creek area are stipulated by No Surface Occupancy to protect grizzly bear habitat while allowing for removal of oil and gas resources adjacent to areas in which occupancy is allowed. Based on public comment to the DEIS, a road corridor in the Cow Creek**

drainage (within the Blackleaf area) was removed from occupancy due to its importance as grizzly bear habitat. This area is now stipulated by NSO.

Leasing with No Surface Occupancy would be allowed **in some areas** along a 1-mile strip along the eastern perimeter of National Forest lands on the Rocky Mountain Division **where opportunities existed** to extract oil and gas resources beneath the National Forest from surface locations outside the Forest boundary, using directional drilling techniques. This would also prevent illegal drainage of Federal mineral resources. *All other areas on the Rocky Mountain Division would not be leased.*

Included in the areas that would not be offered for lease is the RM-1 Geographic Unit (Badger-Two Medicine area) on the Rocky Mountain Division. Although some of the area is not currently leased, most of the area is already under lease and existing leases are under suspension. When the suspension is lifted, those leases will have from 3 to 7 years remaining on their 10-year lease term. In addition, final determination of boundaries for an identified traditional cultural district are still pending.

Similar to Alternative 6, this alternative is also designed to provide consistent management direction for road construction to access surface and subsurface resources in Management Areas F and G (on the Jefferson Division). This alternative allows leasing within a one-mile corridor of existing road in Management Area G and applies a NSO stipulation to the remainder of the Management Area. A NSO stipulation would apply to all of Management Area F. A Forest Plan amendment would be required for this alternative.

[17] Because of limited occupancy opportunities and high recreation use, the access corridor to Crystal Lake in the Big Snowy Mountains would not be leased. This corridor is surrounded by Wilderness Study Area lands. **In addition, inventoried lands adjacent t[illegible]ilderness Study Act areas would not be offered for lease under the preferred alternative. A small area outside, but mostly surrounded by inventoried roadless lands on the south side of the Big Snowy Mountains is also included with the No Lease lands.** This alternative applies a NSO stipulation to watersheds supporting either "managed as pure" or "indicator" populations of westslope cutthroat trout.

* * *

[11] *D. FOREST PLAN AMENDMENTS*

The Forest Plan and its supporting EIS, including the Forest Plan ROD, and this Final EIS and ROD are not in agreement at this time. An amendment is needed to bring the Forest Plan into agreement with the site-specific analysis and findings of the Final EIS. Changes needed are incorporated in Amendment No. 21 to the Forest Plan, included with this ROD under separate cover.

THE FOREST PLAN addressed the availability of lands for leasing but did not specify lands to be offered for oil and gas leasing. THE FINAL OIL and GAS LEASING EIS not only reconsidered the previous availability determination of the Forest Plan, but also provides the site-specific analysis needed to authorize specific lands for leasing in accordance with 36 CFR 228.102(e). Supplemental lease stipulations identified in the Final EIS for

resource protection are included in Forest Plan Amendment No. 21. The Selected Alternative in this ROD has identified those acres that are available for oil and gas leasing, as well as those areas that I am authorizing the BLM to offer for lease. Twenty eight percent (28%) of *legally available* lands are *not* offered for oil and gas leasing activity under the Selected Alternative.

Amendment No. 21 to the Lewis and Clark National Forest Land and Resource Management Plan will make minor changes in management standards and guidelines, and prescriptions.

Significance Determination of Forest Plan Amendments

The changes resulting from Amendment No. 21 do not alter the long-term relationship between levels of multiple-use goods and services as projected by the Forest Plan. The amendment is not significant for the purposes of the planning process based on the following factors identified in FSH 1909.12, section 5.32 and the direction found in 36 CFR 219.10(f):

> [12] *Timing* – This change will take place during the planning period. The change is based on the Federal Onshore Oil and Gas Leasing Reform Act enacted by Congress in 1987. This change is not significant because the 1986 Forest Plan contains overall direction and stipulations for leasing (Forest Plan ROD, page 9 and Forest Plan pages 2-56 through 2-58).
>
> *Location and Size* – The area analyzed for these decisions is the same as the area analyzed for the 1986 Forest Plan. While decisions affecting portions of the planning area (specifically, the Rocky Mountain Division) might be generalized

to be significant amendments, in this case, the amendment is not significant because it is consistent with overall direction contained in the 1986 Forest Plan and ROD which notes that any new leases or reissuance of leases will undergo additional NEPA, including an analysis of new information, and will meet the overall direction and stipulations outlined in the Forest Plan (Forest Plan ROD, page 9, and Forest Plan, page 2-56). As a measure of the level of change resulting from these amendments, I compared the amount of acreage that would either not be leased or leased with No Surface Occupancy between the Forest Plan alternative (Alternative 2) and my decision. I find that there is about 8% more land within the total Forest area under my Selected Alternative that would either not be leased or leased with No Surface Occupancy as compared to the Forest Plan alternative.

Goals, Objectives, and Outputs – These decisions do not alter the long-term relationships between the levels of goods and services projected by the Forest Plan, therefore, the amendment is not significant. The results of a comprehensive analysis that considered the cumulative effects of activities on the resources, economics, and social patterns of the planning area guided these decisions.

Management Prescription – This change only affects oil and gas leasing and development opportunities. It does not alter the desired future condition of the land and resources or the anticipated goods and services to be produced.

* * *

[15] Alternative 7 (Final EIS Preferred Alternative)

This alternative responds to public concern regarding oil and gas development on the Rocky Mountain Division (a large number of public comments opposed oil and gas leasing and development in that portion of the Forest) while providing limited opportunities to explore for oil and gas. Oil and gas leasing and possible development would be allowed (with stipulations) within a one-mile corridor along either side of existing roads in the Blackleaf, Elk Creek, and Cuniff Basin areas only, on the Rocky Mountain Division. Areas adjacent to these roaded corridors and in the Falls Creek area are stipulated by No Surface Occupancy to protect grizzly bear habitat while allowing for removal of oil and gas resources adjacent to areas in which occupancy is allowed. Based on public comment to the Draft EIS, a road corridor in the Cow Creek drainage (within the Blackleaf area) was removed from occupancy due to its importance as grizzly bear habitat. This area is now stipulated by NSO.

Leasing under a No Surface Occupancy stipulation would be allowed *in some areas* along a 1-mile strip along the eastern perimeter of National Forest lands on the rocky Mountain Division where opportunities existed to extract oil and gas resources beneath the National Forest from surface locations outside the forest boundary, using directional drilling techniques. *All other areas on the Rock Mountain Division would not be leased.*

Included in the areas that would not be offered for lease is the RM-1 Geographic Unit (Badger-Two Medicine area) on the Rocky Mountain Division. Although some of the area is not currently leased, most of the area is already

under lease and existing leases are under suspension. When the suspension is lifted, those leases will have from 3 to 7 years remaining on their 10-year lease term. In addition, the final determination of eligibility to the National Register of Historic Places for an identified traditional cultural district in this area is still pending.

[16] Similar to Alternative 6, this alternative is also designed to provide consistent management direction for road construction to access surface and subsurface resources in Management Areas F and G (on the Jefferson Division). This alternative allows leasing within a one-mile corridor of existing roads in Management Area G and applies a NSO stipulation to the remainder of the Management Area. A NSO stipulation would apply to all of Management Area F. In addition, this alternative would apply a NSO stipulation to watersheds supporting either "managed as pure" or "indicator" populations of westslope cutthroat trout.

Because of limited occupancy opportunities and high recreation use, the access corridor to Crystal Lake in the Big Snowy Mountains would not be leased. This corridor is surrounded by Wilderness Study Area lands. In addition, inventoried lands adjacent to Wilderness Study Act areas would not be offered for lease. A small area outside, but mostly surrounded by, inventoried roadless lands on the south side of the Big Snowy Mountains is also included with the No Lease lands.

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